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Docket No. ____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

SCOTT LOGAN GOLLAHER,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

On Petition for a Writ of Certiorari to the Utah Supreme Court

PETITION FOR WRIT OF CERTIORARI

DOUGLAS J. PARRY
Counsel of Record
JAMES K. TRACY
PARRY LAWRENCE & WARD
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84118
(801) 521-3434

Attorneys for Petitioner

47 pp

QUESTIONS PRESENTED

1. Whether the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and the Utah Constitution and the right to access to courts guaranteed by the First Amendment of the United States Constitution and the Utah Constitution guarantees citizens of a state the right to have a court of law consider all arguments properly raised before the court.

2. Whether the Utah Court of Appeals erred in departing from the well-accepted rule that the failure to investigate constitutes ineffective assistance of counsel in violation of the rights guaranteed under the Sixth Amendment of the United States Constitution.

LIST OF PARTIES

The caption of this case contains the names of all the parties to this proceeding.

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Other Authority Cited:

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CITATION OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

State of Utah v. Scott Logan Gollaher, February 26, 1998 Memorandum Decision, Case No. 960618-CA (Utah Ct. App. 1998) (attached as Appendix D).

State of Utah v. Scott Logan Gollaher, March 18, 1998 Order Denying Petition for Rehearing, Case No. 960618-CA (Utah Ct. App. 1998) (attached as Appendix E).

State of Utah v. Scott Logan Gollaher, Sept. 3, 1998 Order Denying Petition for a Writ of Certiorari, Case No. 980227-SC (Utah 1998) (attached as Appendix F).

STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 2104 which allows the Supreme Court to review the judgment of a State court. The judgment sought to be reviewed, a conviction of a second degree felony for sexual abuse of a child, was entered on February 23, 1996.

Gollaher filed a timely notice of appeal and on the Utah Court of Appeals affirmed the conviction in a Memorandum Decision on February 26, 1998. On March 12, 1998, Gollaher filed a petition for rehearing, pointing out that the Court of Appeals failed to consider all of the issues raised in the appeal. The petition was denied without comment on March 18, 1998. Gollaher filed a timely petition for writ of certiorari with the Utah Supreme

Court, Case No. 980227. The Utah Supreme Court denied the petition without comment on September 3, 1998.

Pursuant to 28 U.S.C. § 2101(d) and Rule 13.1 of the Rules of the Supreme Court of the United States, the time for Gollaher to file a Petition for Writ of Certiorari for review of the final judgment of the Utah Supreme Court expires on December 2, 1998.

CONSTITUTIONAL PROVISIONS INVOLVED

A. U.S. CONST. amend. I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

B. U.S. CONST. amend. V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

C. U.S. CONST. amend. VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

D. U.S. CONST. amend. XIV, § 1.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

E. UTAH CONST. Art. I, § 7.

> No person shall be deprived of life, liberty or property, without due process of law.

F. UTAH CONST. Art. I, § 11.

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

STATEMENT OF THE CASE

This is an appeal from a February 23, 1996 conviction in the Third Judicial District Court of Salt Lake County, State of Utah, in which a jury found Gollaher guilty of sexual abuse of a child, a second-degree felony. The allegation was that Gollaher had touched Sarah Call in the genital area while she was sleeping on a trampoline during July 1993.

During the trial, the prosecution asked the victim how long she was touched on the trampoline. She testified that she did not remember how long she was touched on the trampoline but that it was one time "up and down." The prosecution also asked Sarah Call how long she was touched in an unrelated incident in a hot tub over six months after the alleged trampoline incident. Sarah's recollection of the length of touching for this totally unrelated event was never consistent, ranging from as little as "a couple of seconds," to three or six seconds, to 9.7 seconds. Based on her inability to time the unrelated hot tub incident, Sarah Call admitted that it was hard to remember exact times and that she wasn't timing anything.

None of these time estimates related to the trampoline incident for which Gollaher was convicted.[1]

In closing argument, the prosecutor completely misstated the evidence, telling the jury that the evidence had been that Gollaher touched Sarah Call on the trampoline for a "prolonged," "considerable" period of time, "six to nine seconds," thus attributing the time period of the touching in the hot tub incident (the subject of the dismissed count) to the time period of the touching in the trampoline incident.

In addition, the prosecutor incorrectly stated in closing argument that the Gollaher remembered touching Sarah Call

These improper remarks were not objected to by defense counsel. On appeal, Gollaher argued to the Court of Appeals that his counsel was ineffective in failing to object to the improper remarks of the prosecution in closing argument. The Court of Appeals failed to address this argument. Portions of Gollaher's argument showing where this argument was raised below are attached hereto as Appendix A. In his petition for writ of certiorari filed with the Utah Supreme Court, Gollaher argued that the failure of the Court of Appeals to consider all issues raised on appeal violated the due process provisions and the access to courts provisions guaranteed by the United States and Utah constitutions. See Petition for Writ of Certiorari

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[1] Citations to the trial court record are included in the portions of the briefs filed in the Utah appellate courts, attached hereto in the Appendix.

(portions attached as Appendix B) and Reply to Brief in Opposition to Petition for Writ of Certiorari at 4 (portions attached as Appendix C). The Utah Supreme Court denied the petition without comment.

Additionally, Gollaher raised the Sixth Amendment effective assistance of counsel argument on appeal before both the Utah Court of Appeals and the Utah Supreme Court. See Appendix A and B. Gollaher argued that his trial counsel was ineffective in failing to investigate and locate the transcript of a television program that the victim had watched which triggered her disclosure of the alleged abuse. Gollaher specifically requested that his trial counsel investigate the date of the television program watched by Sarah Call and obtain a transcript. When trial counsel failed to comply with Gollaher's request, Gollaher reduced the request to writing on December 4, 1995. Even though the approximate date of the television program was known by the time of the preliminary hearing and even though seven months elapsed between the preliminary hearing and the trial, defense counsel made no attempt to identify the television program that prompted the initial disclosure by the alleged victim to her mother.

After the trial, Gollaher himself conducted an investigation and located a transcript of an ABC News 20/20 program entitled "Making Him Pay," which aired January 28, 1994. In this program, reporters discuss the case of a child approximately the same age as Sarah Call, who describes incidents of touching by a friend of her father in terms strikingly similar to those used by Sarah Call to describe the alleged actions of Gollaher. The young girl received national acclaim for reporting the abuse. The prosecution conceded after trial that the 20/20

program was the program that prompted the disclosure of the alleged abuse. Evidence of this program provided a motive for Sarah Call's disclosure, namely to receive the attention and accolades depicted in the program.

In its Memorandum Decision, the Court of Appeals held that the failure of trial counsel to investigate and locate the television program transcript, in the face of a specific request by the defendant that his counsel do so, did not constitute ineffective assistance of counsel because it was a "strategic decision" of "allocating 'pretrial resources.'" Memorandum Decision at 2. There was no evidence in the trial court that the failure of defense counsel to investigate and locate the transcript had anything to do with allocation of pretrial resources. It was simply a failure to investigate by defense counsel.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to ensure that courts in this country provide due process by considering all arguments raised on appeal. The due process provisions of both the United States and Utah constitutions guarantee that no person shall be deprived of "life, liberty, or property, without due process of law." In addition, the First Amendment guarantees the right "to petition the Government for a redress of grievances." The Utah Constitution also guarantees that "courts shall be open."

In this case, there was no dispute that trial counsel failed to object to prejudicial statements by the prosecutor in closing argument. Gollaher argued to the Utah Court of Appeals that the failure to object constituted

ineffective assistance of counsel. The Utah Court of Appeals simply failed to address this argument. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)). By failing to consider an issue raised on appeal, a court provides no "opportunity to be heard" on that issue whatsoever. This Court has made clear that "[t]he federal interest in ensuring that all citizens have access to the courts is obviously a weighty one." *Three Affilated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 888, 106 S.Ct. 2305, 2312, 90 L.Ed.2d 881 (1986).

Additionally, the Sixth Amendment guarantees the right of an accused to "assistance of counsel for his defence." This Court has recognized that "the right to counsel is the right to effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 1449 n.14, 25 L.Ed.2d 763 (1970)). Further, it is clear that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691; 90 S.Ct. at 2066.

Here, counsel made no investigation at all into the television transcript. Indeed, trial counsel filed a post-trial motion arguing that this was "new evidence" that could not have been discovered. However, the evidence clearly showed that Gollaher had specifically requested his

trial counsel to investigate the transcript and trial counsel simply failed to investigate.

Thus, this Court should also grant the writ to uphold the Sixth Amendment's guarantee of right to effective assistance of counsel.

Respectfully submitted,

DOUGLAS J. PARRY
Counsel of Record
JAMES K. TRACY
PARRY LAWRENCE & WARD

Attorneys for Petitioner

APPENDIX A: PORTIONS OF BRIEF OF APPELLANT SCOTT LOGAN GOLLAHER

UTAH COURT OF APPEALS

Case No. 960618-CA

STATE OF UTAH

Plaintiff-Appellee,

v.

SCOTT LOGAN GOLLAHER

Defendant-Appellant,

On Appeal From the Third District Court, Salt Lake Department, Division I

BRIEF OF APPELLANT SCOTT LOGAN GOLLAHER

* * *

ISSUES PRESENTED FOR REVIEW

* * *

1. Was the defendant deprived of his Sixth Amendment right to effective assistance of counsel by reason of his attorney's failure to investigate and

present evidence of a transcript of a television program that Sarah Call watched that prompted her disclosure of the alleged abuse? This issue was raised below in a post-trial motion that was denied by the trial court. (R. 505-649, 1824). A court will reverse for ineffective assistance of counsel where the defendant can show that counsel's performance was deficient and that the deficient performance prejudiced the defense. State v. Templin, 805 P.2d 182, 186 (Utah 1990) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984)). In a situation where the trial court has previously heard a motion based on ineffective assistance of counsel, the reviewing court is free to make an independent determination of the trial court's conclusions. However, the factual findings of the trial court shall not be set aside on appeal unless clearly erroneous. Templin, 805 P.2d at 186.

* * *

4. Was the defendant deprived of his Sixth Amendment right to effective assistance of counsel by reason of his attorney's failure to object to the improper remarks of the prosecutor during closing argument and to the introduction of evidence of the subsequent hot tub incident? This issue was not raised before the trial court. The appellate court will consider a claim of ineffective assistance of counsel claim raised for the first time on direct appeal. State v. Tennyson, 850 P.2d 461, 466 (Utah Ct. App. 1993). In so doing, the appellate court must decide whether defendant was deprived of the

effective assistance of counsel as a matter of law, applying the Strickland standard set forth above. Id.

s/James K. Tracy
Attorney for Scott Logan Gollaher

APPENDIX B: PORTIONS OF BRIEF OF APPELLANT SCOTT LOGAN GOLLAHER'S PETITION FOR WRIT OF CERTIORARI

UTAH SUPREME COURT

Case No. 980227-SC

STATE OF UTAH

Plaintiff-Appellee,

v.

SCOTT LOGAN GOLLAHER

Defendant-Appellant,

APPELLANT'S PETITION FOR WRIT OF CERTIORARI

* * *

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred by failing to rule on Gollaher's argument that he was deprived of his Sixth Amendment right to effective assistance of counsel by reason of his attorney's failure to object to the improper remarks of the prosecutor during closing argument?

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* * *

3. Whether the Court of Appeals erred in making its own factual findings concerning trial counsel's failure to investigate and obtain a copy of a television program that Sarah Call watched that prompted her disclosure of the alleged abuse, despite a specific request by Gollaher that defense counsel conduct such an investigation, and in concluding that trial counsel was not ineffective in failing to conduct the investigation?

* * *

Facts Related to the Improper Remarks of the Prosecution in Closing Argument Concerning the Length of Touching (Questions 1 and 2)

2. On the first day of Sarah Call's direct testimony, the prosecution asked Sarah how long she was touched on the trampoline. She testified that she did not remember how long she was touched on the trampoline. (R. 939) (Q. "How long was his finger on your private." A. "I don't remember.").

3. The prosecution also asked Sarah Call how long she was touched in an unrelated incident in a hot tub over six months after the alleged trampoline incident. Sarah's recollection of the length of touching for this totally unrelated event was never consistent, ranging from as little as "a couple of seconds" (R. 914), to three or six seconds (R. 979, 969), to 9.7 seconds (R. 998). Based on

her inability to time the unrelated hot tub incident, Sarah Call admitted that it was hard to remember exact times and that she wasn't timing anything. (R. 998). None of these time estimates related to the trampoline incident for which Gollaher was convicted.

4. Sarah did testify that she thought the touching in the hot tub was longer than the touching on the trampoline. (R. 969-970). However, the only direct evidence of the length of the trampoline touching was that Sarah could not remember how long it lasted, but that it was one time "up and down." (R. 939, 962).

5. In closing argument, the prosecutor completely misstated the evidence, telling the jury that the evidence had been that Gollaher touched Sarah Call on the trampoline for a "prolonged," "considerable" period of time, "six to nine seconds," thus attributing the time period of the touching in the hot tub incident (the subject of the dismissed count) to the time period of the touching in the trampoline incident.

- "It was six to nine seconds, if you put the evidence together. The touching was skin to skin." (R. 1316).

- "She says she is awakened by his hand in her vaginal area, rubbing six to nine seconds." (R. 1323).

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- "It was rubbing for a considerable period of time." (R. 1317) (emphasis added).

- "The touching that was described as prolonged." (R. 1316 (emphasis added)).

6. In addition, the prosecutor incorrectly stated in closing argument that the Gollaher remembered touching Sarah Call, stating as follows:

> "Except that he remembered it was rubbing. It was rubbing for a considerable period of time." (R. 1317) (emphasis added).

7. These improper remarks were not objected to by defense counsel.

8. On appeal, Gollaher argued both (1) that his counsel was ineffective in failing to object to the improper remarks of the prosecution in closing argument and (2) that it was plain error for the trial court to allow the improper remarks. See Gollaher's Opening Brief at Point III and Point IV.

9. The Court of Appeals refused to address the plain error argument because it felt that a plain error argument was not raised. Memorandum Decision at 3.

10. The Court of Appeals did not address the ineffective assistance of counsel argument arising out of the failure to object to the improper remarks.

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Facts Related to Failure of Counsel to Investigate and Locate the Television Program Transcript (Questions 3 and 4)

11. Sarah Call's first disclosure of the trampoline incident took place six months after it occurred and was triggered by watching a girl on a television program who said something happened to her. (R. 917-18).

12. During the police interview on March 9, 1994, Sarah stated that she had viewed the television program four or five weeks before the police interview. (R. 570). This would place the television program at the end of January or the beginning of February 1994. This time period was confirmed by Sarah's testimony at the preliminary hearing, when she stated that she spoke to her mother immediately after she viewed the television program. (R. 781). By February 1, 1994, the Division of Family Services had been contacted concerning the incident. (R. 1148.) Thus, given the available information, it was apparent that the television program must have occurred several days prior to February 1, 1994.

13. The defendant specifically requested that his trial counsel investigate the date of the television program watched by Sarah Call and obtain a transcript. (R. 633). When trial counsel failed to comply with the defendant's request, the defendant reduced the request to writing on

December 4, 1995. (R. 634). Among the questions posed by the defendant to his trial counsel was the following:

> Sarah Call testified that she and her father had watched a T.V. show about sexual abuse. Wouldn't it be helpful to know the name of the show and the content. This may lead to determining her motivation. (R. 643).

14. Even though the approximate date of the television program was known by the time of the preliminary hearing and even though seven months elapsed between the preliminary hearing and the trial, defense counsel made no attempt to identify the television program that prompted the initial disclosure by Sarah Call to her mother. Instead, trial counsel filed an affidavit after the trial stating that the television program was new evidence that trial counsel did not know about at trial. (R. 678).

15. After the trial, the defendant himself conducted an investigation and located a transcript of an ABC News 20/20 program entitled "Making Him Pay," which aired January 28, 1994. (R. 645). In this program, reporters Barbara Walters and Hugh Downs discuss the case of Desiray Bartak, a child approximately the same age as Sarah Call, who describes on camera incidents of touching by a friend of her father in terms strikingly similar to those used by Sarah Call to describe the actions

of the defendant, who was also a friend of Sarah's father. See "Making Him Pay" Transcript (R. 587-90). The State conceded after trial that the 20/20 program was the program that prompted Sarah's disclosure of the alleged abuse. (R. 1521, 1785; State's Opposing Brief at 40, n.22).

16. The following is a summary of the similarities between Sarah Call's statements about the alleged touching and the story aired on "20/20" about Desiray Bartak.

Similar Characteristics	**Desiray Bartak**	**Sarah Call**
Age	10 (R. 587)	10 (R. 764)
Alleged defendant	Father's best friend. (R. 588)	Father's best friend. (R. 764)
Reason for visiting defendant	Had children she liked to play with. (R. 587)	Had children she liked to play with. (R. 978)

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Circumstances of alleged molestation	Woke up to defendant massaging and molesting her (R. 587); on a second occasion she had "covers tightly tucked underneath" her and "was tossing and turning" so he couldn't get in. (R. 588)	Woke up to defendant rubbing and molesting her; she "started moving around." (R. 937)
Reaction of victim	Victim did not cry out or urge him to stop, nor did he try to explain what he was doing. Victim pretended to be sleeping because she was too scared. Victim said to herself "It's a dream. Don't believe it, it's a dream." (R. 587)	She did not cry out or urge him to stop, nor did he try to explain what he was doing. She was scared. She went back to sleep. She believed that it was a dream and told her mother she thought it was a dream. (R. 937-40, 1021)

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Post-incident behavior	The next day neither the defendant nor the victim spoke of the incident. (R. 587)	The next day neither the defendant nor the victim spoke of the incident. (R. 942)
First reporting of the incident	Reluctant to tell father because defendant was his best friend; told mother. (R. 588)	Reluctant to tell father, who was defendant's close friend; told mother. (R. 919)

17. In addition, the television program transcript explains how Desiray Bartak received national acclaim and accolades for reporting the abuse. (R. 587-89).

18. In the motion for a new trial, the defendant presented testimony to the trial court that evidence of the transcript of the television program would have been important to both defense counsel and the jury. (R. 605, 1589). This testimony was presented by Dr. Phillip W. Esplin, a psychologist with expertise in evaluating and treating children who have been involved in inappropriate sexual conduct and in evaluating "post event circumstances" that can lead to the alteration of recollections or the creation of genuine but mistaken recollections. (R. 602-03). The expert testimony presented to the trial court demonstrated, among other things, the following:

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a. The close similarities between the television program and Sarah's testimony raise questions about the potential effects of the content of the show on Sarah's report. (R. 605, 1590).

b. The importance of knowing what led a victim to come forward at a particular time in order to generate hypotheses about motive of the witness. (R. 1589).

c. The significance of a television program depicting a young girl who had received national acclaim and accolades for reporting the abuse and the effects of such information upon Sarah Call. (R. 1589-90).

19. The trial court denied the motion for a new trial based on insufficiency of counsel. (R. 1824). In doing so, the trial court specifically (and erroneously) found that the jury had the information regarding the T.V. program. (R. 1816).

20. In its Memorandum Decision, the Court of Appeals held that the failure of trial counsel to investigate and locate the television program transcript, in the face of a specific request by the defendant that his counsel do so, did not constitute ineffective assistance of counsel because it was a "strategic decision" of "allocating 'pretrial resources.'" Memorandum Decision at 2.

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21. There was no evidence in the trial court that the failure of defense counsel to investigate and locate the transcript had anything to do with allocation of pretrial resources. It was simply a failure to investigate by defense counsel.

* * *

ARGUMENT

I. This Court Should Grant the Petition in Order to Ensure that the Court of Appeals Considers All Arguments Raised on Appeal

A. The Court of Appeals Failed to Address Gollaher's Argument that His Counsel Was Ineffective in Failing to Object to the Improper Statements of the Prosecutor During Closing Argument

Gollaher alleged four improper remarks or statements constituting prosecutorial misconduct in closing argument. Gollaher's trial counsel did not object to two of the statements, (1) the statement that "he remembered it was rubbing," and (2) that the touching was "prolonged" and lasted "six to nine seconds." Because trial counsel did not object to these remarks, Gollaher asked the Court of Appeals to review the remarks under the plain error standard. See Gollaher's Opening Brief at 2, 43-47. Alternatively, even if the remarks did not constitute plain

error, Gollaher argued that his trial counsel was ineffective in failing to object to the improper remarks. Id. at 2, 48.

As discussed below, the Court of Appeals refused to consider the improper statements under the plain error standard because it felt that an adequate plain error argument was not presented. Memorandum Decision at 3. However, Gollaher's fourth issue for review was whether Gollaher was deprived of his Sixth Amended right to effective assistance of counsel "by reason of his attorney's failure to object to the improper remarks of the prosecutor during closing argument . . . ." Brief of Appellant at 2. The Court of Appeals did not address this issue at all in its Memorandum Decision.

As explained in Gollaher's briefing, this Court has previously held that the failure to object "likely fails to meet the standard of reasonable representation, . . . thus satisfying the first prong of Strickland." State v. Callahan, 866 P.2d 590, 595 (Utah Ct. App. 1993). The Court of Appeals failed to address this critical issue of failure of trial counsel to object. Gollaher raised this issue in his Petition for Rehearing which was denied without comment by the Court of Appeals.

Failure of the Court of Appeals to address all of the issues raised on appeal constitutes a major departure "from the accepted and usual course of judicial proceedings." This Court should exercise its power of supervision and remand this case to the Court of Appeals for consideration of this overlooked issue.

Appendix B

* * *

II. This Court Should Grant the Petition Because the Court of Appeals Departed from the Well Accepted Rule that Failure to Investigate Falls Below the Objective Standard of Reasonableness

This Court has made clear that a failure to investigate falls below an objective standard of reasonableness in determining ineffective assistance of counsel.

> If counsel does not adequately investigate the underlying facts of a case, including the availability of prospective defense witnesses, counsel's performance cannot fall within the "wide range of reasonable professional assistance." This is because a decision not to investigate cannot be considered a tactical decision.

State v. Templin, 805 P.2d 182, 188 (Utah 1990).

In this case, defense counsel failed to investigate the television program transcript in the face of a direct request by Gollaher to do so. The Court of Appeals ignore the well accepted rule articulated in Templin by finding, without support in the record, that Gollaher's counsel did not investigate because counsel was "allocating pretrial resources." This Court should grant the Petition because the Court of Appeals has departed from the well

accepted rule regarding pretrial investigations as it relates to ineffective assistance of counsel.

s/James K. Tracy
Attorney for Scott Logan Gollaher

APPENDIX C: PORTIONS OF BRIEF OF APPELLANT SCOTT LOGAN GOLLAHER'S PETITION FOR WRIT OF CERTIORARI

UTAH SUPREME COURT

Case No. 980227-SC

STATE OF UTAH

Plaintiff-Appellee,

v.

SCOTT LOGAN GOLLAHER

Defendant-Appellant,

APPELLANT'S PETITION FOR WRIT OF CERTIORARI

* * *

I. The Court of Appeals Failed to Address All Issues Raised by Gollaher on Appeal

On appeal, Gollaher alleged four improper remarks or statements constituting prosecutorial misconduct in closing argument. Gollaher's trial counsel did not object to two of the statements, (1) the statement that "he remembered it was rubbing," and (2) that the touching was "prolonged" and lasted "six to nine seconds."

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Based on these improper remarks and the failure to object, Gollaher presented two distinct arguments to the Court of Appeals:

(1) that despite the lack of objection, the remarks "were clearly contradictory to the evidence in the case, and constitute plain error that justifies reversal of the conviction." Brief of Appellant Scott Logan Gollaher at 47; and

(2) that trial counsel's failure to object constituted ineffective assistance of counsel. Id. at 48-49.

The State argues that by ruling that an adequate plain error argument was not presented as to the first issue, the Court of Appeals "implicitly" ruled that Gollaher had also failed to present an adequate argument for ineffective assistance of counsel arising out of the failure to object. See Brief in Opposition to Petition for Writ of Certiorari at 1, 14-16. Such an argument is nonsensical. Plain error arguments, by definition, arise only when a party has failed to object. Whether plain error exists because of the failure to object and whether ineffective assistance of counsel exists because of the failure to object requires separate analysis. Rejection of a plain error argument does not result in the "implicit" rejection of a corresponding argument for ineffective assistance of counsel.

Gollaher did present an adequate plain error argument. Contrary to the suggestion of the State,

Gollaher did cite the plain error standard before the Court of Appeals. "Under the plain error standard the appellate court will reverse if an error exists, the error should have been obvious to the trial court, and the error is harmful." Brief of Appellant Scott Logan Gollaher at 1 (citing State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993)). Gollaher specifically pointed out that the improper "remarks may be reviewed by the appellate court despite the lack of objection under the plain error standard." Brief of Appellant Scott Logan Gollaher at 3. Gollaher detailed the actual evidence at trial and showed how the improper remarks were contrary to the evidence and argued that the improper remarks "were clearly contradictory to the evidence in the case, and constitute plain error . . . ." Id. at 19-20, 43-45, 47.

The State argues that Gollaher presented the plain error argument in a "casual way." Brief in Opposition to Petition for Writ of Certiorari at 14-15. Although Gollaher disagrees with this characterization, in so characterizing the argument the State concedes nevertheless that Gollaher "presented a plain error argument." Id. The State's real argument is that there was a "patent lack of merit of the argument." Id. at 15. If the plain error argument lacks merit, then the Court of Appeals should so rule. It is not, however, appropriate to simply ignore the argument without discussion.

Gollaher's second argument, that his counsel was ineffective in failing to object to the improper remarks, stands independent of the plain error argument. The Court

of Appeals simply did not address this separate issue relating to ineffective assistance of counsel. The State argues that this Court has often "summarily declined to treat issues it considered meritless." Id. at 16 n.8. However, the Court of Appeals did not rule that Gollaher's ineffective assistance of counsel argument for failure to object was meritless. The Court of Appeals did not rule on the argument at all.

Additionally, trial counsel failed to object to the prosecution's statement that the defendant remembered rubbing Sarah C. The State does not dispute that the record shows that the prosecutor incorrectly stated that the defendant remembered rubbing Sarah C. (R. 1317) ("Except that he remembered it was rubbing. It was rubbing for a considerable period of time." (R. 1317 (emphasis added)).

The State's only response is to claim that the reference in the transcript "is obviously a recording error in the transcript." Brief in Opposition to Petition for Writ of Certiorari at 16. Rule 11(h) of the Utah Rules of Appellate Procedure provide a mechanism for correction or modification of the record on appeal "if any difference arises as to whether the record truly discloses what occurred in the trial court." The State chose to not challenge the record on appeal by the method provided for in the rules of procedure, and thus, the record on appeal must stand as it exists.

Appendix C

The Court of Appeals completely failed to address the issues of whether Gollaher's counsel was ineffective in failing to object to these improper remarks. Litigants do not expect to win every issue they present in court. But they do reasonably expect the court to consider every issue presented. Indeed, the Due Process provisions of the Utah Constitution and the Constitution of the United States, as well as the Open Courts provision of the Utah Constitution, guarantees citizens of this State the right to have a court of law consider all arguments properly raised. See Utah Const. Art. I, Sec. 7, Sec. 11; U.S. Const. amend V.

II. The Court of Appeals Erred in Making Findings Not Supported in the Record Relating to the Failure to Investigate the Television Program

The State argues that the trial court found that Gollaher's trial counsel "actively investigated" the case, and that "implicit" in this finding was a finding that trial counsel "did not have time" to locate the television transcript. Brief in Opposition to Petition for Writ of Certiorari at 17-18. First, the record does not support the State's assertion about an "active investigation" with regard to the television transcript. The trial court found that Gollaher had made a legitimate request to his trial counsel to locate the transcript of the T.V. program (R. 1899), but that the jury "had the information about the T.V. program, and could consider all those things, and did, I suppose." (R. 1895). Of course, the jury did not have the T.V. program transcript because it was never investigated.

Further, there is nothing in anything the trial court stated, implicit or otherwise, concerning trial counsel not having time to locate the transcript.

III. The Court of Appeals Departed from the Well Accepted Rule that Failure to Investigate Falls Below the Objective Standard of Reasonableness

The State's entire response to Points III and IV of Gollaher's petition is contained in footnote 10 of the State's brief. The State does not dispute that a failure to investigate cannot be deemed to be effective assistance of counsel. The State only argues that Gollaher does not dispute that he was not prejudiced by the failure to locate the television transcript. This is incorrect. In fact, the Fourth Question presented for review is whether the Court of Appeals erred in holding that confidence in the verdict was not undermined by the failure of trial counsel to obtain a copy of the television program transcript and Point IV of the argument is entirely devoted to the harmfulness of the error.

APPENDIX D: FEBRUARY 26, 1998 MEMORANDUM DECISION

IN THE UTAH COURT OF APPEALS

Case No. 960618-CA

FILED (February 26, 1998)

STATE OF UTAH

Plaintiff and Appellee,

v.

SCOTT LOGAN GOLLAHER

Defendant and Appellant,

Third District, Salt Lake Department, Division I
The Honorable Timothy R. Hanson

Attorneys: Brent D. Ward and James K. Tracy
Salt Lake City, for Appellant

Jan Graham and Kenneth A. Bronston
Salt Lake City, for Appellee

Before Judges Bench, Greenwood, and Jackson.

JACKSON, Judge:

Appendix D

Gollaher first argues his trial counsel deprived him of effective assistance by both eliciting and not objecting to testimony about the New Year's Eve hot tub incident. Alternatively, he argues the trial court plainly erred in allowing the testimony regarding the incident. We dispose of these arguments by concluding as a matter of law that Gollaher's trial counsel was not ineffective under the two-pronged Strickland analysis. See State v. Villarreal, 857 P.2d 949, 954 (Utah Ct. App. 1993) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)).

"[T]his court will not second-guess trial counsel's legitimate strategic choices, however, flawed those choices might appear in retrospect. . . [A]n ineffective assistance claim succeeds only when no conceivable legitimate tactic or strategy can be surmised from counsel's actions." State v. Tennyson, 850 P.2d 461, 465, 468 (Utah Ct. App. 1993). Our review of the record reveals that trial counsel's legitimate strategy was to use the hot tube evidence both to show the defendant had nothing to hide and to attack the victim's credibility by stressing the possibility that any alleged sexual abuse was either inadvertent the product of a dream. See State v. Hall, 946 P.2d 712, 720-21 (Utah Ct. App. 1997) (holding counsel not "objectively deficient" in deciding to allow hearsay evidence--without entry of statutorily required findings of fact and conclusions of law--to show inconsistencies in victim's recollections); Villarreal, 857 P.2d at 955-56 (holding counsel not deficient in pursuing trial strategy of trying to discredit police investigation and victim's

testimony through eliciting testimonial evidence about defendant's conduct related to dismissed counts and showing defendant had criminal record). Consequently, we conclude Gollaher's counsel was not ineffective and do not address the plain error argument. See State v. Vullock, 791 P.2d 155, 158-59 (Utah 1989) (stating plain error rule does not protect defendant whose trial counsel had reasonably "consciously elect[ed] to permit evidence rather than through inadvertence or neglect").

Gollaher next contends his trial counsel was ineffective in failing to investigate the name and content of a television program. "'"[S]trategic choices made after less than complete investigation are reasonable precisely to the extend that reasonable professional judgments support the limitations on investigation."'" State v. Higgins, 920 P.2d 1195, 1989-99 (Utah Ct. App. 1996) (citations omitted). The great deference we give to trial counsel's strategic decisions includes decisions allocating "pretrial resources." Id. at 1199. Here, the only clues in the record before trial regarding the identity and content of the program were a time frame--possibly a "Saturday night"[2] immediately before February 3, 1994 when the victim filed a police report--and the victim's preliminary hearing testimony that the "TV show. . . had a girl that that happened to her too." Trial counsel was not deficient in choosing not to spend limited resources obtaining and wading through transcripts or tapes of the numerous

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[2] After trial, the show was revealed to be a "20/20" episode. We note that "20/20" typically appeared on Friday evenings.

programs that could have been on numerous channels over several days. Moreover, during such a fishing expedition, counsel would have had no certainty that anything corresponding to the victim's broad description would actually be the program at issue. We agree with the trial court that the record shows, "as a whole," counsel actively investigated potential defense tactics and the underlying facts of this case. Taylor v. Warden, 905 P.2d 277, 283 (Utah 1995). Indeed, "[t]his is not a case in which trial counsel stood by while the [pre-trial period] ran it course." Villarreal, 857 P.2d at 955. We therefore conclude trial counsel was not deficient in failing before trial to identify the name and content of the program. Further, after comparing the program transcript found post-trial, and noting that defense counsel's closing argument alerted the jury that the victim's memory could have been influenced by a program, our confidence in the verdict is not undermined. See id. at 954.

Lastly, Gollaher alleges four instances of prosecutorial misconduct in closing argument that he asserts require reversal of his conviction. The first two statements--"he remembered it was rubbing" and the touching was "six to nine seconds"--were not objected to, and Gollaher does not present us with an adequate plain error argument. See Utah R. App. P. 24(a) (9). Thus, we do not address these allegations. See State v. Blubaugh, 904 P.2d 688, 702 (Utah Ct. App. 1995).

The other two statements were objected to and were the subject of a defense mistrial motion that the trial court

denied. First, the prosecutor's statement about the victim's testimony being consistent with an earlier videotape not in evidence was improper, contrary to the trial court's determination that it was not improper. See State v. Palmer, 860 P.2d 339, 344 (Utah Ct. App. 1993) ("A comment by a prosecutor during closing argument that the jury consider matters outside evidence is prosecutorial misconduct."). However, this improper remark was not prejudicial-i.e., it does not undermine our confidence in the verdict--because (1) the trial court promptly reined in the prosecutor before the jury; (2) the prosecutor retracted his improper statement and substituted a proper one; (3) defense counsel followed up in his closing argument, clarifying that "what we [the attorneys] say is not evidence" and that the videotape was not in evidence; and (4) the jury was instructed by the court (a) not to consider counsels' statements as evidence and (b) to consider only that which was in evidence in making its decision. See State v. Tenney, 913 P.2d 750, 755-56 (Utah Ct. App. 1996).

Second, the prosecutor's allusion to Gollaher's son not testifying was at most an indirect "missing witness" reference. However, even assuming for the sake of argument that this reference was improper, we will not overturn a jury verdict "'"merely because some error or irregularity may have occurred, but will do so only if it is something substantial and prejudicial in the sense that there is a reasonable likelihood that in its absence there would have been a difference result."'" State v. Thompson, 776 P.2d 48, 51 (Utah 1989) (citations omitted). We conclude

the reference here does not rise to this standard, because (1) the jury was obviously aware that there was no dispute Gollaher's son was asleep during the event in question and therefore had nothing to add as a witness; (2) before witnesses were called at trial, the trial court instructed the jury that Gollaher had no burden to defend himself (thus, the jury would have known inferentially that Gollaher had no burden to produce witnesses); (3) defense counsel noted in closing argument that the defendant need not prove anything; and (4) the jury was instructed:

> In considering the evidence in this case, you must not place any emphasis on the fact that the defendant has not presented evidence or witnesses beyond what he has presented, since the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

See id. at 50-51 (explaining why court did not consider missing witness reference to be prejudicial).

Accordingly, we affirm.

s/Norman H. Jackson, Judge

WE CONCUR:

s/Russell W. Bench, Judge
s/Pamela T. Greenwood, Judge

APPENDIX E: MARCH 18, 1998 ORDER DENYING PETITION FOR REHEARING

IN THE UTAH COURT OF APPEALS

ORDER

Case No. 960618-CA

STATE OF UTAH

Plaintiff and Appellee,

v.

SCOTT LOGAN GOLLAHER

Defendant and Appellant,

This matter is before the court upon appellant's petition for rehearing, filed March 12, 1998.

IT IS HEREBY ORDERED that the petition for rehearing is denied.

Dated this 8th day of March 1998.

FOR THE COURT:

s/Pamela T. Greenwood, Judge

APPENDIX F: SEPTEMBER 3, 1998 ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

IN THE SUPREME COURT OF THE STATE OF UTAH

No. 980227-SC

960618-CA
841901671

STATE OF UTAH

Plaintiff and Respondent,

v.

SCOTT LOGAN GOLLAHER

Defendant and Petitioner,

ORDER

The Petition for a Writ of Certiorari is denied.

Dated September 3, 1998

FOR THE COURT:

s/Richard C. Howe
Chief Justice

Supreme Court, U.S.
FILED
JAN 6 1999
OFFICE OF THE CLERK

No. 98-930

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

SCOTT LOGAN GOLLAHER,

Petitioner,

v.

STATE OF UTAH,

Respondent.

On Petition for a Writ of Certiorari to the Utah Supreme Court

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BRIEF IN OPPOSITION

JAN GRAHAM
Utah Attorney General
MARIAN DECKER*
KENNETH A. BRONSTON
Assistant Attorneys General
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

*Counsel of Record

QUESTIONS PRESENTED

1. Does this Court have jurisdiction to review a challenge to the Utah Court of Appeals' refusal to consider at length claims which did not present substantial federal questions?

2. Should this Court grant certiorari review to revisit the well-established ineffective assistance of counsel standard relating to pretrial investigation?

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JURISDICTION

Petitioner, Scott Logan Gollaher, correctly recites the procedural history of this case. However, petitioner incorrectly cites as the ground of this Court's jurisdiction 28 U.S.C. § 2104 (1993), which merely addresses the manner in which review of a state court judgment shall be conducted. Because petitioner asserts state court violations of the First, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, this Court would presumably have jurisdiction under 28 U.S.C. § 1257 (1993) ("Final judgments . . . rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any . . . right . . . is specially set up or claimed under the Constitution . . . ."). However, under section 1257, as discussed below, this Court lacks jurisdiction to review petitioner's first claim, to wit: that due process and the right to access to the courts, collectively guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution and the Utah Constitution, guarantee citizens of a state the right to have a court of law consider all arguments properly raised before the court.

STATEMENT OF THE CASE

Petitioner, Scott Logan Gollaher, was convicted of sexual abuse of a child, a second degree felony.

The conviction stemmed from the jury's conclusion that petitioner fondled for several seconds the genital's of the 11-year old victim, Sarah C., as she awakened from sleep on a trampoline located in petitioner's backyard (R. 895, 923, 937, 970). Earlier in the evening, Sarah's father left her at the house of petitioner, who was a family friend, with the

intention of having Sarah babysit petitioner's then 5-year old son (R. 924-25, 943-44, 1035-36, 1238). After Sarah's father left, petitioner arranged his son and Sarah, who was wearing only her panties and one of petitioner's nightshirts, on the trampoline (R. 926-27). Thereafter, petitioner invited Sarah to his hot tub and "playfully" threw her into it (R. 928-31). When her panties became wet, Sarah, at petitioner's suggestion, gave them to petitioner to dry. They talked for about ten minutes. Then she got out of the tub, put on a dry night shirt in petitioner's house, and returned to the trampoline. Petitioner never got in the hot tub with Sarah or watched her change shirts (R. 931-35).

At the trampoline, petitioner directed Sarah to lie next to him with her feet towards his head and his feet towards her head "so that [she] wouldn't kick him or something" (R. 936). Petitioner also asked to share Sarah's blanket because he was cold. Sarah assented, and petitioner shared half of her blanket (R. 966-67). In this position, six to eight inches away from petitioner, naked beneath a blanket except for a T-shirt, Sarah fell asleep (R. 935-37, 964). She was awakened by petitioner's finger touching her "private" (R. 937). In response, she moved around and changed positions, but petitioner kept putting her back in the same position (R. 937-38). She did not recall how many times petitioner's finger was in her private, but it was between about six and nine seconds (R. 939, 969-70, 997-98). Scared, she got off the trampoline to retrieve her wet panties, returned to the trampoline, and got back into the same position as before. Concerned about walking home in the dark, Sarah stayed the night (R. 939-941). In the morning she awoke to find only petitioner's son, who slept through the incident, on the trampoline (R. 942).

Sarah testified she was scared because "[she] didn't think [petitioner] would do that 'cause he was such a close friend" (R. 943-44). She did not tell anyone because she was scared of what might happen (R. 944). Though Sarah acknowledged that she had testified at the preliminary hearing that she thought the incident might have been a dream, she was sure that petitioner had, in fact, touched her "private" (R. 943).

Late in 1993, on or about New Year's Eve, Sarah and her sister and father were in petitioner's hot tub with petitioner and petitioner's son, at which time Sarah thought she felt petitioner again touch her "private" for a few seconds (R. 907, 914-15, 1079, 1267).

Sarah did not tell anyone about the hot tub episode (R. 916). However, later that month, she and her father watched a television program about another young girl who had also been sexually abused (R. 918, 1038-1041). She said nothing to her father, but after the program, Sarah immediately went to her mother and disclosed the particulars of petitioner's abuse (R. 868-69, 918-21, 1020, 1042).

Petitioner admitted that he could have touched Sarah while he slept, but stated that he did not inappropriately touch her (R. 1255, 1292). Other witnesses for the defense testified that they frequently saw Sarah at petitioner's home, though frequently in the close company of her father (R. 1186-88, 1197, 1199, 1203, 1218, 1221).

Facts Relating to Claims the Court of Appeals Cursorily Addressed.

At trial, Sarah was unable to give the prosecutor a definitive answer when he first asked her how long or how many times petitioner's finger was in her "private" while they were on the trampoline, stating that petitioner rubbed her "up and down" for a "couple of seconds" (R. 914, 939, 961-62). However, he was able to elicit a response relating to the hot tub incident in late December 1993, which enabled Sarah to expressly assert how long petitioner had touched her in the trampoline incident, to wit: six seconds and that petitioner touched her longer with his hand on the trampoline than he did with his foot in the hot tub (R. 969-70). On cross-examination petitioner's trial counsel, Mr. Ronald Yengich, timed Sarah's recollection of how long petitioner touched her in the hot tub at 9.7 seconds (R. 998).

In closing, the prosecutor without specific reference to the hot tub, argued to the jury that by putting the evidence together it could find that petitioner had touched Sarah on the trampoline from six to nine seconds (R. 1316, 1323). Explaining the distinction between direct and circumstantial evidence, the record records the prosecutor as stating: "Except that he remembered it was rubbing. It was rubbing for a considerable period of time. That's pretty firm circumstantial evidence that the person who was doing it was awake" (R. 1317) (emphasis added).

Mr. Yengich, did not object to these closing remarks. The court of appeals declined to address petitioner's allegation that the prosecutor's remarks constituted misconduct because petitioner "does not present us with an

adequate plain error argument." State v. Gollaher, No. 960618-CA, slip op. at 3 (Utah App. Feb. 26, 1998) (unpublished) ("Gollaher").

Facts Relating to Alleged Failure to Investigate.

Sarah C. testified at the preliminary hearing that she knew that petitioner's touching her on the trampoline was not a dream when she experienced a similar episode in the hot tub on New Year's Day (R. 795). Sarah did not disclose the abuse until she had seen a television program portraying another young girl who had been abused (R. 918). Sarah's father said that the program that led to his daughter's disclosure was on around January 12 or 13, 1994, but that he did not know the channel it was on (R. 1139).

Following trial, Mr. Yengich (R. 263) or petitioner (R. 645) asserted that the program viewed by Sarah and her father was a "20/20" program, aired on January 28, 1994 (R. 263, 299-302). Upon this "newly discovered" evidence, Mr. Yengich moved for a new trial (R. 253-306). In support of his motion, Mr. Yengich claimed that he could not have presented the transcript of this program because the name of the program was unknown and unable to be discovered, to wit: the program was never mentioned in any of the proceedings and the victim could not remember when the program was aired (R. 266). Before that motion could be heard, petitioner engaged different counsel, Brent Ward, and asserted in a substituted motion for arrest of judgment or for a new trial that he had suggested by written memorandum sent prior to trial that Mr. Yengich identify the program Sarah and her father watched for the purpose of assessing her motivation, and that Mr. Yengich had done nothing (R. 643).

The substituted motion claimed that Sarah's rendition of sexual abuse was so remarkably similar to a sexual abuse victim's story portrayed in the "20/20" segment entitled, "Making Him Pay," that it indicated, along with other alleged infirmities in Sarah's accounts, that her rendition was likely the product of suggestion rather than real experience (R. 508-10, 525, 591-601).[1] Mr. Yengich's new trial motion also charted the similarities subsequently referred to in the substituted motion (R. 263-65), all of which petitioner repeated in his opening brief on appeal and in his petition for writ of certiorari in the Utah Supreme Court. App. Br. at 17; Pet. Br. at 9-10.

In further support of his substituted motion, petitioner offered the testimony of Phillip Esplin, Ph.D., a psychologist with expertise in child sex abuse and post-event memory recall (R. 1574-76). Dr. Esplin, who read the police reports, preliminary and trial testimony, Sarah's statement to the police and a transcript of the "20/20" program, but neither attended trial nor reviewed the videotaped police interview (R. 1578), said that his expertise could have been "helpful" in educating the jury on some aspects of the case.

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[1] Based on the transcript of the "20/20" program (R. 236-39), Desiray Bartak was ten years old when she was sexually abused by her godfather, one of her father's closest friends (R. 236-37). While visiting with her godfather on a summer vacation, she awoke to his "massaging and molesting" with his fingers inside her, an experience she thought must be a dream (R. 236-38). Afterward, Desiray did not talk about the incident because she was afraid that her godfather might hurt someone in her family (R. 237). Only after he attempted to abuse her the following summer did she tell her story (R. 237). As a result of her disclosure, Desiray was lauded for her courage in coming forward with her story and publicly leading an effort in similarly encouraging other victims (R. 238).

On cross-examination, Dr. Esplin acknowledged that all sexual molestations have elements in common and frequently involve the perpetrator's putting his hands on the victim's vaginal area, and that perpetration by a close family friend while the victim is asleep or pretends to be asleep is a common feature that he did not find unusual (R. 1611-13). He also admitted that in the eleven pages of comparison prepared by petitioner, only four statements of the T.V. victim paralleled Sarah's statements (R. 1610).

Testifying for the State, Sally Anderson, Sarah's counselor, asserted that sex abuse victims frequently postulated that their experiences might have been dreamed, as a defense mechanism against the fact of the abuse (R. 1645-47, 1751). Ms. Anderson further stated that even if she had known that the television program contained such similar factors, that would not have caused her to doubt the certainty of Sarah's memory of her experience because the "20/20" program merely allowed Sarah to talk about her experience and not get in trouble (R. 1785-86). Mr. Bruce Giffen, M.Sci., a forensic examiner in child abuse cases retained by petitioner post-trial to assess the effect of the television program, opined that the "20/20" program was not the genesis of Sarah's disclosure of sexual allegations (R. 677, 683-84).

Additionally, there were significant differences in Sarah's and Desiray's accounts. Particularly, (1) Sarah reported that petitioner rubbed her genitals between six and nine seconds, whereas Desiray's godfather molested her for ten minutes (R. 238, 969, 998); (2) Sarah did not report the abuse because petitioner was such a close friend, whereas Desiray feared her godfather, whom she "hates" and "will

never forgive," might retaliate (R. 237-38, 944, 1646, 1770); and (3) Sarah readily told her mother upon seeing the "20/20" program, whereas Desiray doubted that he mother would believe her because her godfather was a trusted friend (R. 237, 868-69, 918-21, 1020, 1042).

Additionally, in response to petitioner's substituted motion, Mr. Yengich filed an affidavit asserting as to the "20/20" program, that "neither myself, Mr. Gollaher, nor Mr. Cope [prosecutor] was aware of that program," acknowledging that it "could have been of some assistance, [but] no one knew about it at the time" (R. 678).

The trial court denied the substituted motion, finding that the jury had petitioner's evidence arguing the victim's "dream," and "the information about the T.V. program, and could consider all those things, and did, I suppose" (R. 1815-16).

The Utah Court of Appeals found Mr. Yengich was not ineffective in not allocating pretrial resources to a search for the "20/20" transcript and that, "after comparing the program transcript found post-trial [with the victim's testimony] . . . our confidence in the verdict is not undermined." Gollaher, slip op. at 3 (citation omitted).

REASONS FOR DENYING THE PETITION

I. This Court Lacks Jurisdiction Concerning Petitioner's First Question.

"It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." Cardinale v. Louisiana, 394 U.S. 437, 438 (1969) (noting that a federal question that had not been raised, preserved, or passed upon in the state courts deprived not only the Court of jurisdiction under 28 U.S.C. § 1257, but also the state court of an opportunity to consider the matter). See also Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257, 276-277, 277 n.23 (1989) (declining to find either that a nonconstitutional argument "clearly intended" a constitutional one, or that a claim made under the Eighth Amendment embraced one asserted under the Due Process Clause of the Fourteenth Amendment).

Petitioner accurately notes that he claimed the Utah Court of Appeals' improperly refused to consider issues relating to remarks made by the prosecutor. However, contrary to petitioner's assertion, see Br. of Pet. at 5, he never argued, either to the court of appeals in his petition for rehearing or to the Utah Supreme Court in his petition for writ of certiorari, any federal constitutional basis for his claim. Rather, petitioner argued in the court of appeals only that the court incorrectly applied rule 24(a), Utah Rules of Appellate Procedure (requiring briefs contain arguments related to issues presented), and State v. Blubaugh, 904 P.2d 688, 707 (Utah App. 1995) (refusing to consider inadequately preserved claims of prosecutorial misconduct under the plain

error standard), cert. denied, 913 P.2d 749 (Utah 1996). See Pet. for Rehearing at 2-5. In the Utah Supreme Court, petitioner made precisely the same argument as in the court of appeals, with the additional assertion that certiorari was warranted under rule 46, Utah Rules of Appellate Procedure (identifying considerations governing review of certiorari) because "[f]ailure of the Court of Appeals to address all of the issues raised on appeal constitutes a major departure "from the accepted and usual course of judicial proceedings." See Pet. for Certiorari at 14-16.[2]

In sum, petitioner failed to preserve any substantial federal question in Utah's appellate courts, and therefore, this Court lacks jurisdiction to consider petitioner's first question. Furthermore, the Utah Court of Appeals did cursorily consider petitioner's claims, see Gollaher, slip op. at 3, and

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[2] Only in his reply to the State's brief in opposition to certiorari did petitioner raise, by citation without any substantive argument, a federal due process claim under the Fifth Amendment, and he never claimed any right to access to the courts under the First Amendment. See Reply to Br. in Opp. at 4. However, under Utah law, Utah's appellate court's will not consider, for lack of preservation, a claim first raised in a reply brief. See Trail Mountain Coal Co. v. Utah Div. of State Lands and Forestry, 921 P.2d 1365, 1371 n.11 (Utah 1996) (refusing to consider petitioner's claims concerning statute of limitations first raised in reply brief because petitioner failed to present to the Court a "full and proper presentation of the issues"), cert. denied, 117 S. Ct. 1017 (1997); McDougal v. Weed, 945 P.2d 175, 179 n.3 (Utah App. 1997) ("'Because presentation of this argument in a reply brief does not conform to "Rule 24(c) of the Appellate Rules of Procedure limiting answers in a reply brief to new matter in the appellee's brief," we decline to consider this argument.'")(citation omitted); State v. Phathammavong, 860 P.2d 1001, 1002 n.2 (Utah App. 1993) (striking the defendant's reply brief after oral argument because, in part, it raised new issues).

understood them patently without merit,[3] thus rendering petitioner's first question groundless. Finally, authority cited by petitioner is totally distinguishable from this case, and therefore lends no support for his claim. See Matthews v. Eldridge, 424 U.S. 319, 345-49 (1976) (no denial of due process where social security disability claimant may be denied benefits before an evidentiary hearing but only after being allowed opportunity to present sufficient evidence of medical condition); Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877, 892-93 (1986) (reversing district court's refusal to hear Indian tribe's negligence claim for lack of subject matter jurisdiction which totally denied tribe's ability to have its claim heard).

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[3] The facts plainly show that, in accord with the evidence, that the prosecutor determined the period of abuse on the trampoline by referring to the approximate six to nine second period of abuse Sarah believed petitioner touched in the hot tub, (R. 969-70). Secondly, the prosecutor's statement, in apparent reference to petitioner, i.e. "***he*** remembered it was rubbing," is obviously a recording error in the transcript because ***"he,"*** as opposed to ***"she,"*** makes no sense where (1) the prosecutor was in the midst of explaining that there was only circumstantial, as opposed to direct, evidence that petitioner's touching was not inadvertent, (2) it was undisputed that petitioner never acknowledged rubbing Sarah's genitals intentionally, a fact that could not have been missed by the jury during a hotly contested, two-day trial, and (3) a prominent defense attorney failed to object to what would be a plainly inaccurate remark.

II. Because This Court Has Established Clear Standards Concerning Ineffective Assistance of Counsel for Failure To Investigate, Certiorari Review is Unwarranted.

Petitioner asserts that this Court should grant certiorari review because his trial counsel, Mr. Yengich, failed to investigate a television program that purportedly would have lent support to the defense's theory of the case. However, as petitioner notes, see Br. of Pet. at 8, this Court has already set standards of review for ineffective assistance of counsel in precisely the situation presented in this case. See Strickland v. Washington, 466 U.S. 668, 691 (1984) ("[C]ounsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary."). Indeed, in Strickland, this Court granted certiorari because the Court had neither directly and fully addressed a claim of actual ineffectiveness in a case going to trial, nor established standards for assessing ineffective assistance of counsel. Id. at 683-84. Thus, petitioner's request for certiorari review asks this Court to walk well-trodden ground, merely for the purpose of correcting an allegedly incorrect result based on well-established principles, an inadequate basis for granting certiorari. Cf. Ross v. Moffit, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."). Moreover, petitioner's request invites this Court to become involved in hairsplitting assessments of adequate investigation, an inappropriate standard in the evaluation of effective assistance of counsel. Strickland, 466 U.S. at 689 ("Indeed, the existence of detailed guidelines for representation could distract counsel from the

overriding mission of vigorous advocacy of defendant's cause.").

In any case, the Utah Court of Appeals correctly concluded under this Court's guiding principles in Strickland, and its Utah progeny, that Mr. Yengich did not render ineffective assistance of counsel. The court of appeals noted: "We agree with the trial court that the record shows, 'as a whole,' counsel actively investigated potential defense tactics and the underlying facts of the case," and that this was not a case in which counsel merely stood by as trial approached. Gollaher, slip op. at 2-3. Implicit in the lower court's recognition of counsel's "active investigation" are the court of appeals' findings that Mr. Yengich did not have time for a fishing expedition for a program which, as the record supports, was unknown by either name or date to any of the parties and not mentioned in any of the proceedings (R. 266, 678).

More importantly, the court of appeals considered the "20/20" transcript and concluded that petitioner was not prejudiced by Mr. Yengich's failure to discover it pretrial. Gollaher, slip op. at 3. Petitioner's stated purpose for the transcript was to show that Sarah's rendition of events was so similar to a story told by the child sex abuse victim portrayed on "20/20" as to be suggested, and therefore apocryphal. (R. 508-10, 525, 591-601). Petitioner offered Dr. Esplin's testimony as primary support for this theory (R. 1574-76, 1588-90). However, had this testimony been offered at trial, it would have been dramatically rebutted by Sally Anderson, Sarah's counselor, and Bruce Giffen, petitioner's post-trial forensic examiner (R. 677, 683-84, 1645-47, 1751, 1785-86). Indeed, the trial court recognized that Mr. Yengich had made

the correct tactical decision in not calling an expert to testify to the victim's suggestibility, based on the State's rebuttal at the hearing on petitioner's substituted motion: "The jury would have been out a substantially less period of time had they heard that evidence" (R. 1822). Additionally, in comparing the testimonies of the Sarah and Desiray Bartak, the court of appeals evidently agreed with the State that the similarities were not sufficient to undermine its confidence in the verdict, a finding which petitioner does not dispute.[4]

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[4] In his petition for writ of certiorari in the Utah Supreme Court, petitioner urged the court to grant certiorari based on Mr. Yengich's failure to search for the then-unknown television program, citing State v. Templin, 805 P.2d 182 (Utah 1990), in support. See Br. of Pet. at Appendix B, p. 16a. Templin however, is substantially different from this case, see id. at 186-88 (finding ineffective assistance where counsel knew of, but chose not to investigate witness who actually observed the victim's amorous behavior less than an hour before the alleged rape).

CONCLUSION

The Court should deny the petition.

Respectfully submitted,
Counsel for Respondent:

JAN GRAHAM
Utah Attorney General
MARIAN DECKER*
KENNETH A. BRONSTON
Assistant Attorneys General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-0180

Counsel for Respondent
*Counsel of Record